United States Department of Labor
Employees' Compensation Appeals Board

A.R., Appellant	)	
and	)	**Docket No. 20-0057**
	)	**Issued: April 7, 2021**
DEPARTMENT OF AGRICULTURE, FOOD, SAFETY, & INSPECTION SERVICE, Minneapolis, MN, Employer	)	

Appearances:
Aaron B. Aumiller, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 1, 2019 appellant, through counsel, filed a timely appeal from an April 4, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP).[2] Pursuant to the

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from April 4, 2019, the date of OWCP's last decision, was October 1, 2019. Since using October 7, 2019, the date the appeal was received by the Clerk of the Appellate Boards would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is October 1, 2019, rendering the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

Federal Employees' Compensation Act[3] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[4]

ISSUE

The issue is whether appellant has met her burden of proof to establish disability from work for the period November 9, 2017 through March 29, 2018 causally related to her accepted July 29, 2015 employment injury.

FACTUAL HISTORY

On August 5, 2015 appellant, then a 32-year-old food slaughter inspector, filed a traumatic injury claim (Form CA-1) alleging that on July 29, 2015 she sustained a right knee injury when she slipped and landed on her right knee while in the performance of duty. She stopped work on that date. OWCP accepted appellant claim for right knee patella chondromalacia and right knee contusion and paid her wage-loss compensation on the supplemental rolls beginning September 16, 2015. On January 20, 2017 appellant returned to modified-duty work.

By decision dated March 6, 2017, OWCP expanded its acceptance of appellant's claim to include right leg peroneal nerve injury. Appellant subsequently underwent authorized right knee peroneal nerve decompression surgery on April 25, 2017. She stopped work again and returned to full-duty work on June 20, 2017.

Appellant continued to receive medical treatment. In a September 27, 2017 report and state workers' compensation form, Dr. Wilson C. Choy, a Board-certified orthopedic surgeon, noted right knee examination findings of mild effusion, patellofemoral crepitance with range of motion, which is audible, and anterior pain. He diagnosed bilateral knee patellofemoral arthritis. Dr. Choy indicated that appellant was capable of working sedentary duty and could not work night shifts due to painful swelling that occurred at night.

In a November 15, 2017 prescription note and state workers' compensation form, Dr. Choy requested that appellant be excused from work from November 7 through 15, 2017 due to severe knee pain and swelling.

A November 18, 2017 right knee magnetic resonance imaging (MRI) scan revealed progression of arthritic changes in the patellofemoral compartment, extensive full-thickness chondral loss along the lateral patellar facet, low-grade chondral change along the trochlea, and small suprapatellar effusion.

[3] 5 U.S.C. § 8101 *et seq.*

[4] The Board notes that, following the April 4, 2019 decision, appellant submitted additional evidence to OWCP. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

Appellant submitted a November 21, 2017 progress note by Dr. Manonmani Antony, a Board-certified anesthesiologist and pain medicine specialist, who noted that appellant sustained a July 29, 2015 employment injury and recounted that appellant had been experiencing extreme right knee pain over the last three weeks. Dr. Antony reported that appellant had not been back to work since November 7, 2017 due to increased knee pain. Upon examination of appellant's right knee, she observed crepitation with movement of the patellofemoral joint, positive grind test, and limited range of motion. Dr. Antony assessed chronic pain syndrome, right knee unilateral primary osteoarthritis, right knee patellofemoral disorder, right lower leg peroneal nerve injury and right foot drop.

In a November 21, 2017 state workers' compensation form, Dr. Patrick Kane, a Board-certified orthopedic surgeon, noted diagnoses of right knee patella instability and patellofemoral arthritis. He indicated that appellant could work light duty.

In a November 28, 2017 progress report, Dr. Kane recounted that appellant had been dealing with right knee pain "on and off for a long time now" and had recently been put into a knee immobilizer on November 12, 2017. Upon examination of appellant's right knee, he observed mild effusion, positive patellofemoral crepitus, positive patellar grind, and medial instability of the patella. Dr. Kane assessed that appellant had a "complex problem regarding her right knee, with largely patellofemoral joint issues … likely due to the patient's previous lateral release."

On November 30, 2017 appellant filed a claim for compensation (Form CA-7) for disability during the period November 8 through December 1, 2017. She additionally filed CA-7 forms requesting wage-loss compensation for disability for the period December 4, 2017 through March 30, 2018.

In a December 18, 2017 development letter, OWCP informed appellant that the documentation received to date was insufficient to establish her claim for wage-loss compensation benefits commencing November 8, 2017 and continuing. It advised her of the type of medical evidence necessary to establish her disability claim and afforded her 30 days to submit the necessary evidence.

OWCP received a December 14, 2017 progress note by Dr. Gedge Rosson, a Board-certified plastic surgeon, who indicated that appellant was seen for a postoperative follow-up visit after her April 25, 2017 right lower extremity surgery. He reported that appellant still had some residual "nerve-type" sensations.

In a December 22, 2017 progress report, Frances Morthole, a registered nurse, evaluated appellant for complaints of continued right knee pain after a July 29, 2015 employment injury. She indicated that appellant had not worked since November 7, 2017 due to knee pain.

In a January 12, 2018 memorandum of telephone call (Form CA-110), appellant informed an OWCP claims examiner that she was not allowed to return to light duty. An OWCP claims examiner then contacted L.M., a representative for the employing establishment, and confirmed that light duty was not available to appellant.

By decision dated February 21, 2018, OWCP denied appellant's claim for wage-loss compensation due to total disability commencing November 8, 2017. It found that the medical evidence of record was insufficient to establish a causal relationship between her accepted employment injury and the claimed disability.

Appellant subsequently submitted a January 9, 2018 state workers' compensation form in which Dr. Kane noted that she sustained a work-related medical diagnosis of right knee patella instability. He reported that appellant could work light duty.

In a February 20, 2018 report and state workers' compensation form, Dr. Kane described the July 29, 2015 employment injury and the subsequent surgeries that appellant had undergone. He provided examination findings and assessed that appellant had "right knee pain from medial patellar instability, patellofemoral chondromalacia, and osteoarthritis." Dr. Kane indicated that appellant could work light duty and had surgery scheduled for March 2018.

On February 28, 2018 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

Appellant also submitted reports dated January 19 through March 2, 2018 by Dr. Maryum Rafique, an osteopathic physician Board-certified in physical medicine and rehabilitation. Dr. Rafique noted the July 29, 2015 employment injury and reported right knee examination findings of positive joint effusion and tenderness along the medial and lateral joint lines and facets of the patella. She assessed right knee pain, right knee post-traumatic osteoarthritis, abnormalities of gait and mobility, chronic pain syndrome, and left knee pain.

On March 6, 2018 OWCP referred a statement of accepted facts (SOAF) and the medical record to Dr. Harold Fenster, a Board-certified surgeon serving as the district medical adviser (DMA), for an opinion regarding whether the proposed right knee arthroscopic surgery was necessary to treat her work-related injury. In a March 20, 2018 report, Dr. Fenster reviewed appellant's history of injury and noted that her claim was accepted for right knee chondromalacia patellae, right knee contusion, and right lower leg peroneal nerve injury. He discussed the medical records that he had reviewed and indicated that after the April 25, 2017 right knee peroneal nerve release surgery, appellant had persistent patellofemoral symptoms, positive Grind test, and crepitus on examination. Dr. Fenster also noted that a November 18, 2017 right knee MRI scan was abnormal and showed progression of arthritic changes in the patellofemoral compartment. He opined that appellant had a "chronic injury that was not abetted by her initial injury." Dr. Fenster concluded that Dr. Kane's proposed right knee arthroscopic surgery was medically necessary to attempt to cure appellant's work-related right knee injury that was aggravated by her initial right knee surgery.

In a March 28, 2018 report, Jessica Azad, a physician assistant, recounted appellant's complaints of right knee pain and noted a date of onset of July 29, 2015. She conducted an examination and diagnosed right knee pain.

On March 30, 2018 appellant underwent authorized right knee surgery for lateral patella tibial ligament reconstruction and arthroscopic chondroplasty lateral tibial plateau. OWCP paid

appellant wage-loss compensation on the supplemental rolls, effective March 30, 2018, and on the periodic rolls, effective April 29, 2018.

Appellant continued to submit reports regarding postoperative medical treatment for her right knee, including April 25, May 30, and June 18, 2018 reports by Dr. Rafique, a May 21, 2018 report by Ms. Azad, and reports and state workers' compensation forms dated April 10 through August 14, 2018 by Dr. Kane.

On July 11, 2018 a telephonic hearing was held. By decision dated August 22, 2018, an OWCP hearing representative affirmed the February 21, 2018 decision.

On January 7, 2019 appellant, through counsel, requested reconsideration and submitted additional medical evidence.

Appellant subsequently submitted a September 6, 2018 letter by Dr. Kane who described the July 29, 2015 employment injury and appellant's subsequent medical treatment. Dr. Kane indicated that on November 12, 2017 appellant was treated by Dr. Choy and put into an immobilizer due to "aggravation of her right knee pain that ultimately required her to be out of work starting on November 9, 2017." He recounted that his previous examination findings revealed patella femoral arthritis and medial patellar instability from her previous surgery.

Dr. Kane continued to provide progress reports and state workers' compensation forms dated September 25 through December 4, 2018 regarding appellant's medical treatment for right knee osteoarthritis and ability to work light duty.

In reports dated September 17 through November 12, 2018, Brad Boyer, a physician assistant, conducted an examination and diagnosed right knee pain, right knee post-traumatic osteoarthritis, chronic pain syndrome, and abnormalities of gait and mobility.

By decision dated November 6, 2018, OWCP expanded the acceptance of appellant's claim to include recurrent dislocation of patella, right knee and temporary aggravation of right knee unilateral post-traumatic osteoarthritis.

In reports dated December 12, 2018 through February 11, 2019, Dr. Rafique recounted appellant's continued complaints of right knee pain. She provided examination findings and diagnosed right knee pain, right knee unilateral post-traumatic osteoarthritis, abnormalities of gait and mobility, chronic pain syndrome, and left knee pain.

In an April 4, 2019 decision, OWCP denied modification of its prior decisions.

LEGAL PRECEDENT

An employee seeking benefits under FECA[5] has the burden of proof to establish the essential elements of his or her claim, including the fact that any disability or specific condition

[5] *Supra* note 3.

for which compensation is claimed is causally related to the employment injury.[6] The term disability is defined as the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of the injury.[7] For each period of disability claimed, the employee has the burden of proof to establish that he or she was disabled from work as a result of the accepted employment injury.[8] Whether a particular injury causes an employee to become disabled from work, and the duration of that disability, are medical issues that must be proven by a preponderance of the reliable, probative, and substantial medical evidence.[9]

The medical evidence required to establish causal relationship between a claimed period of disability and an employment injury is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the claimed disability and the specific employment factors identified by the claimant.[10]

The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow an employee to self-certify his or her disability and entitlement to compensation.[11]

ANALYSIS

The Board finds that this case is not in posture for decision.

In support of her claim for wage-loss compensation, appellant submitted various reports by Drs. Antony and Kane dated November 21, 2017 through September 6, 2018. In a November 21, 2017 report, Dr. Antony described the July 29, 2015 employment injury and noted current right knee examination findings of mild effusion, patellofemoral crepitance with range of motion, and anterior pain. She assessed right knee primary osteoarthritis, right knee patellofemoral disorders, and right lower leg peroneal nerve injury. Dr. Antony recounted that appellant had been experiencing extreme right knee pain over the last three weeks and had not been back to work since November 7, 2017.

[6] *S.W.*, Docket No. 18-1529 (issued April 19, 2019); *B.K.*, Docket No. 18-0386 (issued September 14, 2018); *Amelia S. Jefferson*, 57 ECAB 183 (2005); *see also Nathaniel Milton*, 37 ECAB 712 (1986).

[7] 20 C.F.R. § 10.5(f); *S.T.*, Docket No. 18-0412 (issued October 22, 2018); *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

[8] *K.C.*, Docket No. 17-1612 (issued October 16, 2018); *William A. Archer*, 55 ECAB 674 (2004).

[9] *S.G.*, Docket No. 18-1076 (issued April 11, 2019); *Fereidoon Kharabi*, 52 ECAB 291, 292 (2001).

[10] *K.H.*, Docket No. 19-1635 (issued March 5, 2020); *V.A.*, Docket No. 19-1123 (issued October 29, 2019).

[11] *K.A.*, Docket No. 19-1564 (issued June 3, 2020); *J.B.*, Docket No. 19-0715 (issued September 12, 2019); *William A. Archer*, *supra* note 8.

Similarly, in a November 28, 2017 report, Dr. Kane discussed appellant's history of the July 29, 2015 employment injury and noted abnormal right knee examination findings. He assessed that appellant had a "complex problem regarding her right knee, with largely patellofemoral joint issues … likely due to the patient's previous lateral release." Dr. Kane subsequently submitted a September 6, 2018 letter where he reviewed appellant's history of injury and explained that appellant sustained an "aggravation of her right knee pain that ultimately required her to be out of work starting on November 9, 2017."

The Board finds that, while the reports from Dr. Antony and Dr. Kane are not completely rationalized, they are consistent in indicating that appellant was unable to work full duty, beginning November 7, 2017, due to continued right knee symptoms and abnormal examination findings, and their reports are not contradicted by any substantial factual or medical evidence of record.[12] Moreover, the March 20, 2018 opinion of DMA Dr. Fenster, regarding whether the proposed right knee arthroscopic surgery was necessary to treat her work-related injury also supports that appellant had continued abnormal right knee examination findings and symptoms due to her July 29, 2015 employment injury. These reports strongly suggest and support a relationship between appellant's current condition and disability for the period November 9, 2017 through March 29, 2018, and the accepted January 29, 2015 employment injury. Accordingly, they are sufficient to require OWCP to further develop the medical evidence.[13]

It is well established that proceedings under FECA are not adversarial in nature, and while appellant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.[14] OWCP has an obligation to see that justice is done.[15] Thus, the Board will remand the case to OWCP for further development of the medical evidence in order to determine whether appellant's disability from work from November 9, 2017 through March 29, 2018 was causally related to her July 29, 2015 employment injury. On remand OWCP shall prepare an updated SOAF to include appellant's additional conditions of recurrent dislocation of the patella of the right knee and temporary aggravation of right knee osteoarthritis. OWCP shall then refer the case record, along with the updated SOAF, and appellant to a medical specialist in the appropriate field of medicine, consistent with OWCP's procedures, to determine whether her disability from work from November 9, 2017 through March 29, 2018 was causally related to her accepted July 29, 2015 employment injury.[16] Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

[12] *See D.G.*, Docket No. 18-0043 (issued May 7, 2019); *E.J.*, Docket No. 09-1481 (issued February 19, 2010).

[13] *See J.S.*, Docket No. 19-0892 (issued November 4, 2020).

[14] *See, e.g., M.G.*, Docket No. 18-1310 (issued April 16, 2019); *Walter A. Fundinger, Jr.*, 37 ECAB 200, 204 (1985); *Dorothy L. Sidwell*, 36 ECAB 699, 707 (1985); *Michael Gallo*, 29 ECAB 159, 161 (1978); *William N. Saathoff*, 8 ECAB 769, 770-71 (1956);.

[15] *See A.J.*, Docket No. 18-0905 (issued December 10, 2018); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983); *Gertrude E. Evans*, 26 ECAB 195 (1974).

[16] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.9.b(3) (June 2015).

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the April 4, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: April 7, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board